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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PETER ROMANO,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether Petitioner's Sixth Amendment right to a public trial was violated when, during the trial court's instructions to the jury, no member of the public was permitted to enter or leave the courtroom.

Parties to the proceeding in the Court of Appeals were:

The United States of America, Carmine Romano and Peter Romano.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on June 24, 1982.

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit has not yet been officially reported. It is bound with this Petition as the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 24, 1982. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment

The pertinent provisions of the Sixth Amendment to the Constitution of the United States read as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . . .

STATEMENT

Petitioner was tried jointly with his brother Carmine[1] upon a multi-count indictment. The facts of this case—insofar as they are relevant here—may be briefly set forth as follows:

Local 359 of the United Seafood Workers, Smoked Fish and Cannery Union ("Local 359") has represented the workers in the New York City Fulton Fish Market for many years. In May of 1980, Petitioner replaced his brother Carmine as its chief official and, as such, was responsible for Local 359's continued receipt of monthly payments of twenty-five dollars from numerous of its members' employers for the rental of plastic union plaques. Those payments were received on a monthly basis until mid-December of 1980, when Local 359 was indicted for receiving them.[2] During the continued grand jury investigation of the affairs of Local 359, Petitioner responded to a grand jury subpoena *duces tecum* directed toward the union and, testifying before the grand jury, denied possession of a document ostensibly called for by the subpoena.

Thereafter, Petitioner was indicted by a grand jury sitting in the Southern District of New York for thirty-one violations of 29 U.S.C. §186 (in connection with Local 359's receipt of the plaque rental payments) and for one count each of obstruction of justice and of making a false declaration, in violation of 18

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[1] We understand that Carmine Romano is also filing a petition for a writ of certiorari. We hereby adopt, with the permission of this Court, the second point raised by him concerning the unconstitutionality of the Second Circuit rule requiring no *mens rea* for a conviction under 29 U.S.C. §186(b).

[2] Based upon the receipt of this very plaque rental money, Local 359 was convicted of forty-six violations of 29 U.S.C. §186. On September 30, 1981, the Second Circuit affirmed the conviction. This Court denied certiorari. *Local 359, United Seafood Workers, Smoked Fish and Cannery Union v. United States*, U.S. , 102 S.Ct. 1434 (1982).

U.S.C. §§1503 and 1623 (in connection with his grand jury testimony and failure to produce the document in question). Moreover, with those crimes being used as predicate offenses, he was accused of a RICO conspiracy with his brother and others and a substantive RICO offense, in violation of 18 U.S.C. §1962.[3]

The trial of Petitioner and his brother Carmine began on October 22, 1981 in the United States District Court for the Southern District of New York before Hon. Lee P. Gagliardi and a jury. Immediately before the jury was charged on the law, and over defense objection based upon Sixth Amendment "public access" grounds, the trial court ordered the courtroom doors locked, first permitting those in attendance to leave if they wished, but thereafter permitting neither ingress nor egress by anyone during the duration of the charge.[4] The trial court stated that the sole reason for the order was to prevent distraction of the jury. Thereafter, the jury convicted Petitioner of all the charges submitted to it as to him and voted a forfeiture of his Local 359 office.

On February 5, 1982, Petitioner was sentenced to terms of imprisonment totalling eighteen months and a five-year term of probation.

REASONS FOR GRANTING THE WRIT

Petitioner's Sixth Amendment Right to a Public Trial Was Violated by the Court Order That, During Its Instructions to the Jury, No One Would be Permitted to Enter or Leave the Courtroom

From the ratification of the Sixth Amendment to the filing of this Petition, the issue of whether a defendant's right to a public trial includes the right to an open courtroom during the trial

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[3] Six others were indicted with the Romano brothers, but were severed before trial. Some of the counts ultimately submitted to the jury charged only Petitioner, some only his brother and some charged both.

[4] A specific exception to the exclusion order, however, was made for the court stenographers who would be transcribing the charge. They, unlike all others, could enter and leave the courtroom during the charge.

court's charge to the jury appears to have been directly ruled upon by a *federal* court solely by the Second Circuit in this very case.[5] We submit that a sufficient reason for granting the writ is the fact that the sole federal case in point on such a fundamentally-important federal right is dead wrong on the issue. Since its impact upon the future course of the law in this area may thus be substantial, its holding should be nipped in the bud here and now. Moreover, those state courts which have considered this issue—whether under their own constitutions or under that of the United States—have almost invariably reached the opposite result. It would be bizarre indeed if state courts interpreting Sixth-Amendment-based state constitutional provisions concerning public trial were to find in them more protection for an accused than federal courts will find in the Sixth Amendment itself.

We have discovered but six state court cases on the precise point we bring to this Court: *People v. Micalizzi*, 223 Mich. 580, 194 N.W. 540 (1923); *McKibben v. State*, 187 Ga. 651, 2 S.E.2d 101 (1939); *People v. Buck*, 46 Cal. App. 2d 558, 116 P.2d 160 (1941); *State v. Lawrence*, 167 N.W.2d 912 (Iowa 1969); *Renfroe v. State*, 49 Ala. App. 713, 275 So. 2d 692 (1973); and *State v. Gibb*, 303 N.W.2d 673 (Iowa 1981).

In *Micalizzi*, a murder conviction was reversed upon the sole ground that the defendant's right to a public trial was violated by the very practice approved by the Second Circuit in this

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[5] The only other reference to this issue which our research has disclosed in a federal case is in the opinion of Circuit Judge Edgerton, dissenting from the court's opinion on another issue, in *Walker v. United States*, 322 F.2d 434, 438 (D.C. Cir. 1963). There, Judge Edgerton stated that:

> Since a charge to the jury is a necessary part of a criminal trial, if the public is excluded from the courtroom when a charge is given, the right to a public trial is denied and the conviction must be reversed, irrespective of prejudice.

So absent are federal cases on point that Judge Edgerton cited only *People v. Micalizzi*, 223 Mich. 580, 194 N.W. 540 (1923)—a case upon which we too rely. *See* pp. 4-5, *infra*.

case.[6] Referring to "star chamber trials," the Michigan Supreme Court stated (223 Mich. at 582; 194 N.W. at 541) that:

> The defendant by the Constitution was guaranteed a public trial, not one behind locked doors; he was guaranteed a trial to which the public was admitted, not part of the public and part of the time, but the public generally and all of the time.

In *McKibben*, the trial court had given a supplemental instruction to the jurors in the jury room rather than in open court. A challenge to that event upon the ground that it violated the defendant's right to a public trial was rejected by the Georgia Supreme Court upon the sole ground that the record showed that nothing had prevented any member of the public from attending the supplemental charge in the jury room, just as he or she would have been able to do in open court.

In *Buck*, the very kind of order involved in this case was given and later challenged by the defendant. The California Court of Appeals rejected the argument because of the defendant's failure to object to the order when it was given and also because, as the defendant himself seemed to agree at the time, the order promoted the convenience of the court and all others present, including the defendant himself.

In *Lawrence*, the Supreme court of Iowa had before it a murder conviction case in which there had been an *accidental* exclusion[7] of the general public[8] from the courtroom during the charge to the jury. Recognizing that a part of the public may be excluded from a criminal trial "for good and sufficient reason," the court held however that "no more persons than are neces-

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[6] One of the defendant's attorneys, among others, was a victim of the court-ordered exclusion. The reversal, however, was based solely upon the denial of the defendant's right to a public trial and not upon any denial of his right to counsel.

[7] The exclusion was not ordered by the trial court, but was apparently based upon a bailiff's misunderstanding of a statement made by the trial court. In this case, of course, the exclusion order was no accident.

[8] The opinion does not make clear whether the defendant's family and friends were thus excluded, although the use of the term "general public" suggests that they were not.

sary to secure those proper objectives may be excluded." 167 N.W.2d at 915. The conviction was reversed because of the unnecessary and therefore improper limitation of the defendant's right to a public trial.[9]

In *Renfroe*—the only state case on point we have found which would support the Second Circuit's holding in *this* case—the Alabama Court of Criminal Appeals simply held that an order excluding the public from the courtroom during the charge to the jury was "properly a matter for the trial court's discretion and did not prevent a public trial within the sense of constitutional requirements." 49 Ala. App. 2d at 718, 275 So. 2d at 696.

Finally, in *Gibb*, the locking of the courthouse doors during an evening charge to the jury was upheld over a public trial objection only because the record showed that members of the general public who wished to hear the charge could have obtained admittance to the courtroom for that purpose by ringing a call button at the front door of the courthouse, thus summoning a janitor who would have admitted them.

Thus, with but a single exception,[10] the state cases in point either directly hold or clearly imply that the practice about

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[9] The *Lawrence* court stressed a practical advantage of having the courtroom open to the public during the judge's charge, in the following statement (167 N.W.2d at 914):

> Publicity may also be said to discourage undue emphasis by the court when charging the jury. When instructing the jury as to the law applicable to a given case, overemphasis by repetition or voice inflection could, of course, materially affect jury consideration of the matter, and such undue emphasis would not be reflected by the printed copy of the instructions later available to the public.

No claim was or could have been made at trial that Judge Gagliardi so conducted himself, nor is such a claim made here.

[10] We note that the *Renfroe* case involved a situation where the defendant made no objection to the exclusion order—a fact which may have contributed to the holding. We also note that *Renfroe* is in apparent conflict with the Alabama Supreme Court's rule generally mandating fully-open trial proceedings. *Wade v. State*, 207 Ala. 1, 92 So. 101 (1921).

which we complain constitutes a serious violation of a defendant's right to a public trial.[11]

We realize, of course, that the right to a public trial is not absolute, but is subject to reasonable limitations. We submit that the avoidance of closed-door criminal justice is so imperative that those limitations will pass constitutional muster only if based upon strict and inescapable necessity. *See, e.g., United States ex rel. Bennett v. Rundle*, 419 F.2d 599, 607 (3d Cir. 1969).[12] And whether such a necessity exists may generally be determined only after a full and fair judicial consideration not only of all the facts, but of the more important public policies that the Sixth Amendment protects. *See, e.g., United States v. Cianfrani*, 573 F.2d 835, 854 (3d Cir. 1978); *cf. Globe Newspaper Co. v. Superior Court*, U.S. , 102 S.Ct. 2613, 2621-22 (1932). Here, no such consideration took place; the trial court merely enforced—without even a whispered hint of necessity—a local rule of practice which it noted had been followed "since the memory of man runneth not to the contrary."

We submit that the closing of the courtroom was clearly not necessary;[13] if it were, such a closing would be a standard prac-

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[11] In analogous situations, federal law is clear that even a limited exclusion of the public violates a defendant's right to a public trial. *See, e.g., United States v. Kobli*, 172 F.2d 919 (3d Cir. 1949), where an exclusion of all persons except the defendants, their counsel, witnesses and members of the press during the selection of the jury was held to be a violation of the defendant's Sixth Amendment right to a public trial.

[12] When a *defendant* wishes to bar press and public from his trial, it has been held that he is required to show a substantial probability that a *public* trial would irreparably damage his right to a *fair* one. *See, e.g., United States v. Powers*, 622 F.2d 317 (8th Cir.), *cert. denied*, 449 U.S. 837 (1980). Even-handed justice dictates, we submit, that some similar test be employed to judge the propriety of an exclusion order—even a limited one—issued over his objection. "[T]he validity of a doctrine does not depend on whose ox it gores." *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 525 (1953) (Jackson, J., dissenting).

[13] The argument that a closed courtroom during the charge to the jury is required to prevent the distraction of the jury lacks merit. Carried to its logical conclusion, the prevention of distraction rationale could be advanced to justify closing trials in their entirety. No one could reasonably contend, however, that such a practice would be allowed by the Sixth Amendment. Singling out the instructions to the jury as particularly requiring the absence of distraction

tice throughout the country. But that is surely not the case. Counsel for Petitioner have conducted a telephonic survey of experienced criminal defense lawyers throughout the United States[14] with respect to whether the courtroom is "closed"—that is, whether ingress and egress are prohibited—during jury instructions in their federal and state trial courts. The results of that survey are as follows:

Jurisdiction	Local Courts	Federal Courts
Alabama	Rarely closed	Always closed
Alaska	Never closed	Never closed
Arizona	Never closed	Never closed
Arkansas	Never closed	Never closed
California		
(San Francisco vicinity)	Generally closed[15]	Generally closed
(Los Angeles vicinity)	Always closed	Varies by judge
(San Diego vicinity)	Rarely closed	Rarely closed
Colorado	Never closed	Never closed
Connecticut	Generally closed	Always closed
Delaware	Always closed	Always closed
District of Columbia	Always closed	Always closed
Florida		
(Miami vicinity)	Always closed	Never closed
(Jacksonville vicinity)	Always closed	Always closed

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does not withstand analysis. Any part of the charge may easily be reread to the jury. Indeed, in some jurisdictions, a written copy of the instructions is provided to the jurors. The demeanor of a crucial witness (*e.g.*, a temporary facial expression), on the other hand, cannot be recreated for a juror who was "distracted" by persons entering or leaving the courtroom.

[14] With but few exceptions, the names of the attorneys called were chosen at random from a list of lawyers with state and federal criminal trial experience contained in B. Tarlow, *National Directory of Criminal Lawyers* (1979). Should this Court so desire, we are prepared to submit an affidavit giving the names of the attorneys who provided us with the information.

[15] In the San Francisco Municipal Court, which tries countless misdemeanor cases, judges do *not* close the courtroom during the instructions to the jury. With this exception, the survey dealt with a particular jurisdiction's practice in felony trials.

Jurisdiction	Local Courts	Federal Courts
Georgia	Always closed	Always closed
Hawaii	Never closed	Never closed
Idaho	Never closed	Never closed
Illinois	Generally closed	Varies by judge
Indiana	Rarely closed	Never closed
Iowa	Never closed	Never closed
Kansas	Never closed	Never closed
Kentucky	Rarely closed[16]	Never closed
Louisiana	Rarely closed	Always closed
Maine	Varies by judge	Never closed
Maryland	Never closed	Never closed
Massachusetts	Always closed	Varies by judge
Michigan	Rarely closed	Never closed
Minnesota	Always closed	Always closed
Mississippi	Never closed	Never closed
Missouri		
(St. Louis vicinity)	Always closed	Generally closed
(Kansas City vicinity)	Never closed	Never closed
Montana	Never closed	Varies by judge
Nebraska	Never closed	Never closed
Nevada	Never closed	Never closed
New Hampshire	Always closed[16]	Always closed
New Jersey	Always closed	Generally closed
New Mexico	Never closed	Never closed
New York	Always closed	Always closed
North Carolina	Generally closed	Varies by judge
North Dakota	Always closed	Always closed
Ohio		
(Cleveland vicinity)	Never closed	Never closed
(Cincinnati vicinity)	Varies by judge	Varies by judge

[16] In the local courts of Kentucky and New Hampshire, when ingress and egress are forbidden during the charge, they are also forbidden during the attorneys' summations.

Jurisdiction	Local Courts	Federal Courts
Oklahoma	Never closed	Always closed
Oregon	Never closed	Never closed
Pennsylvania	Always closed	Always closed
Rhode Island	Always closed	Rarely closed
South Carolina	Always closed	Always closed
South Dakota	Never closed	Never closed
Tennessee		
(Nashville vicinity)	Always closed	Always closed
(Memphis vicinity)	Always closed	Never closed
Texas		
(Dallas vicinity)	Never closed	Never closed
(Houston vicinity)	Never closed	Varies by judge
Utah	Never closed	Never closed
Vermont	Never closed	Always closed
Virginia	Never closed	Always closed
Washington	Never closed	Never closed
West Virginia	Never closed	Never closed
Wisconsin	Rarely closed[17]	Never closed
Wyoming	Never closed	Never closed

The result of the poll is obvious[18]—approximately half of the jurisdictions in the country find no necessity to do what the trial court did here. We submit that a "public trial" in Manhattan should mean the very same thing as a "public trial" in Muncie if, as we have always thought, both are governed by the very same Sixth Amendment.

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[17] In the local courts of Wisconsin, those few judges who limit ingress and egress usually will not do so if the defendant objects to the practice.

[18] A tabulation of the results of the survey shows the following totals in each of our five categories which relate to the closing of the courtroom during the instructions to the jury:

	Never	Rarely	Varies	Generally	Always
Local Courts	27	7	2	4	18
Federal Courts	29	2	7	3	17

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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